U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of OLIVER E. CHAMBERS and DEPARTMENT OF LABOR, MINE, SAFETY & HEALTH ADMINISTRATION, Arlington, VA

Docket No. 99-683; Submitted on the Record;
Issued November 4, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation under 5 U.S.C. § 8106(c) based on his refusal to accept suitable employment as offered by the employing establishment.

The Board has carefully reviewed the case record and finds that the Office met its burden of proof in terminating appellant's compensation.

Once the Office accepts a claim it has the burden of proving that the employee's disability has ceased or lessened before it may terminate or modify compensation benefits.[1] Section 8106(c)(2) of the Federal Employees' Compensation Act[2] provides that the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[3] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[4]

The implementing regulation[5] provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified, and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated.[6] To

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[1] *Karen L. Mayewski*, 45 ECAB 219, 221 (1993); *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

[2] 5 U.S.C. §§ 8101-8193 (1974); 5 U.S.C. § 8106(c)(2).

[3] *Camillo R. DeArcangelis*, 42 ECAB 941, 943 (1991).

[4] *Stephen R. Lubin*, 43 ECAB 564, 573 (1992).

[5] 20 C.F.R. § 10.124(c).

[6] *John E. Lemker*, 45 ECAB 258, 263 (1993).

justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[7] The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence.[8]

Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.[9] Unacceptable reasons include relocation for personal desire or financial gain, lack of promotion potential or job security.[10] Thus, the Board has held that if an employee on the employing establishment's rolls moves from the area in which the employing establishment is located, such a move is an unacceptable reason for refusing an offer of suitable work.[11]

In this case, appellant, then a 51-year-old safety specialist, filed a notice of traumatic injury, claiming that on March 5, 1985 he slipped and fell in a motel shower injuring his hip and leg after he had finished inspecting a CAV mine. The Office accepted the conditions of acute back strain, herniated nucleus pulposus L5-S1 and partial hemilaminectomy L4-5, L5-S1 on left with diskectomy L5-S1. Appellant stopped work on March 5, 1985 and has not returned.

In a Form OWCP-5 dated March 13, 1996, Dr. Sidney L. Wallace, a Board-certified orthopedic surgeon and appellant's treating physician, released appellant to work with restrictions on bending, twisting, lifting and overhead reaching.

In a letter dated October 23, 1996, Dr. Wallace stated that appellant could perform sedentary and at the outmost light-duty work. He indicated, however, that appellant was unable to drive any distance. Dr. Wallace stated that driving to and from work would be acceptable assuming that it was not an one hour drive to and a similar amount from work. He will need to alternate sitting and standing. Dr. Wallace indicated that appellant's functional capacity evaluation indicated that he is very pain focused at least when he visits a physician and when he had his evaluation.

By letter dated January 31, 1997, the employing establishment offered appellant the job of mine safety health specialist, with relocation expenses, in Birmingham, Alabama. The offered position was based on Dr. Wallace's medical reports of March 13 and October 23, 1996. The physical requirements of the position were described as primarily sedentary, consisting of review and analysis work performed in an office setting. Appellant would perform most duties while

[7] *Maggie L. Moore*, 42 ECAB 484, 487 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[8] *Marilyn D. Polk*, 44 ECAB 673, 680 (1993).

[9] *C.W. Hopkins*, 47 ECAB 725 (1996); *see Patsy R. Tatum*, 44 ECAB 490, 495 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5 (May 1996).

[10] *Arthur C. Reck*, 47 ECAB 339 (1996).

[11] *Richard S. Gumper*, 43 ECAB 811, 816 (1992); *Arquelio Pacheco*, 40 ECAB 277, 280 (1988).

seated at a desk and free to move about the office as necessary to check files or reference materials, make copies, or discuss issues related to health and other program activities with inspectors, specialists, or supervisors. Consultation with mine operators would occasionally take place at a mine site, but appellant would not participate in actual onsite inspection or investigation work. In an attachment to the position description, the physical demands of the position were further clarified as requiring no lifting greater than 10 pounds on an occasional, intermittent basis. Examples of items lifted would be: pens, pencils, stapler and files weighing approximately zero to three pounds. The above items would be utilized while providing assistance relative to health and safety work and other mandatory programs conducted by district personnel and include researching and analyzing data. In the performance of the above duties, kneeling, stooping and overhead reaching would occur on an intermittent, occasional basis, to retrieve files needed for an assignment. No duties would require crawling, climbing, bending, or squatting. Most contacts with the mine offices would be made over the telephone.

By letter dated March 5, 1997, appellant refused the job offer stating, "Because of the on[-]the[-]job injury I suffered I am not physically capable of performing the duties of the job offered."

By letter dated March 6, 1997, the Office advised appellant that the offered position was suitable. The Office informed appellant that he had 30 days to accept the job offer or explain why he had refused it. The Office warned appellant of the consequences of refusing a suitable job offer without adequate justification. Appellant did not respond.[12]

By decision dated April 9, 1997, the Office terminated compensation for monetary benefits only, effective April 26, 1997, on the grounds that appellant had refused an offer of suitable work.

Following the Office's decision, medical treatment notes from Dr. Wallace were received. In medical treatment notes dated April 25 and May 1, 1997, he stated that appellant had a recent magnetic resonance imaging (MRI) scan which revealed a little degenerative disc protrusion. Dr. Wallace also stated that perhaps appellant has mild foraminal and lateral recess stenosis, but opined that it was not severe. In a treatment note dated May 14, 1997, Dr. Wallace stated:

> "[Appellant] returns today wanting a letter stating that according to our clinical records a form was filled out for the Department of Labor on March 23, 1996. Item 3 according to our records had the above limitations that [appellant] may work blank hours per day. On my copy I did not fill this out and [appellant] brought in a copy that the Department of Labor had sent him and apparently someone had placed in there 6 [to] 8 hours a day. According to my clinical records, this was not done in my office."

[12] Appellant's attorney submitted a March 27, 1997 letter in which he requested a lump-sum settlement for appellant's work-related injury.

In a treatment note dated June 11, 1998, Dr. Wallace stated that he reviewed the mine safety and health specialist position. He explained that appellant could perform this work at a local office "such as his home with computer and [tele]phone, that he might be able to accomplish this task but I do not feel based on his back problems that he is going to be able to drive a car for any length of time, travel into a number of states and as I indicated in the past he does have restrictions with regard to his activity." Dr. Wallace reiterated that appellant should sit, stand and walk only intermittently, from about 30 minutes to an hour at the most with lifting restricted to 10 to 20 pounds. Dr. Wallace said appellant should not be climbing, allowed only intermittent kneeling and twisting and proscribed any inspections in mines, either surface or underground. He opined that he did not feel appellant would be able to adequately manage the proposed job that was offered him.

Appellant requested an oral hearing, which was held on June 17, 1998. By decision dated August 20, 1998, the Office hearing representative affirmed the termination on the grounds that appellant had refused an offer of suitable work.

In this case, the Office properly complied with the procedural requirements of advising appellant of the suitability of the job offered and the sanctions for refusing the job. The Office informed appellant that the job was available and provided him with the opportunity either to accept the position or explain his refusal. While appellant stated that he was not physically capable of performing the duties of the job offered, he failed to respond to the Office's March 6, 1997 letter which found that the offered position was suitable. Therefore, the Office properly terminated his compensation.[13]

The Board finds that the evidence of record establishes that appellant is capable of performing the duties of the mine safety and health specialist position offered by the employing establishment.[14] Dr. Wallace completed a work restriction form on March 13, 1996 stating that appellant was able to work with restrictions on bending, twisting, lifting and overhead reaching. In his October 23, 1996 letter, he indicated that appellant could perform sedentary and light-duty work, but would not be able to drive any distance. Dr. Wallace further stated that "the driving to and from work would be acceptable assuming that it was n[o]t an one hour drive to and a similar amount from work." This does not indicate that appellant can only work out of his home. In his treatment note of June 11, 1998, Dr. Wallace reiterated he had reviewed the job offer and advised that appellant was able to perform the offered position at a local office such as his home with computer and telephone, but could not drive a car for "any length of time." He also described physical restrictions pertaining to intermittent sitting, standing and walking and a lifting restriction of 10 to 20 pounds. Dr. Wallace stated that appellant should not be climbing, only intermittent kneeling and twisting, and no mine inspections, either surface or underground. Because the offered position included relocation expenses to Birmingham, Alabama, with minimal requirement to drive to any mine sites, the Board finds that the duties specified in the

[13] *See Henry W. Shepherd, III*, 48 ECAB ___ (Docket No. 96-814, issued March 3, 1997) (finding that appellant's compensation was properly terminated after the Office found his reasons for refusing suitable work unacceptable).

[14] *See Michael I. Schaffer*, 46 ECAB 845 (1995) (finding the medical evidence sufficient to establish that appellant was physically capable of performing the duties of the offered modified position).

modified mine safety health specialist position conform to the restrictions recommended by Dr. Wallace. Although Dr. Wallace commented that he did not feel appellant would be able to perform such a position, this statement appears to be based on the erroneous assumption that the position required extensive driving and travel from state to state.

Although Dr. Wallace commented in his treatment note of May 14, 1997 that he did not complete the number of hours appellant could work per day, there is no indication in the record that Dr. Wallace expressed disagreement with the full-time sedentary work offered in an office setting. Moreover, by letter dated June 11, 1998, Dr. Wallace subsequently reviewed the position and clarified that appellant could perform the full-time duties of the position. The position requires limited duty in an office setting with no inspection of mines as proscribed by Dr. Wallace.

The Board notes that the position offered appellant would require him to relocate from Tennessee to Birmingham, Alabama. Appellant was specifically advised that relocation expenses were authorized by the employing establishment. His personal preference not to relocate to Birmingham, Alabama, as it would remove him from physical contact with his physicians does not justify his refusal of the job offer.[15] Appellant was still carried on the rolls of the employing establishment in Tennessee at the time the job offer was made and, as appellant had not resigned from that agency, it was required to find a suitable position for him which it did in January 1997. The medical evidence submitted by appellant does not establish that he remains totally disabled or unable to perform the duties of the modified job offered. Thus, the Board finds that appellant was not justified in refusing an offer of suitable work which included relocation expenses.

[15] *See Richard S. Gumper*, 43 ECAB 811 (1992) (finding that an employee's move away from the area to which the employing establishment is located is an unacceptable reason for his refusal to accept an offered position if the employee is still on the agency's rolls); *cf. Carl N. Curts*, 45 ECAB 374, 381 (1994) (noting that if an employee has left the employing establishment's rolls, a move or relocation from its area may give rise to an acceptable reason for refusing a position offered by the employing establishment under some circumstances).

The decision of the Office of Workers' Compensation Programs dated August 20, 1998 is affirmed.

Dated, Washington, D.C.
November 4, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member